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In The
Supreme Court of the United States
October Term, 1988

FRANK B. SHAVER,

Petitioner,

v.

F. W. WOOLWORTH CO.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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RULE 28.1 LISTING

Respondent F. W. Woolworth Co. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent F. W. Woolworth Co. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's decision in this case. That decision is reported at 840 F.2d 1361 (7th Cir. 1988).

STATEMENT OF CASE

This case arises out of petitioner's claim-splitting. Petitioner originally filed a lawsuit (*Shaver I*) in federal court based on the termination of his employment. He invoked federal question jurisdiction pursuant to the Age Discrimination In Employment Act (29 U.S.C. §§ 621 *et seq.*) and alleged pendent state claims. The district court granted summary judgment to respondent on the federal claim and *sua sponte* declined to exercise pendent jurisdiction over the state claims. Petitioner,

aware of the availability of diversity jurisdiction,¹ failed to assert this mandatory basis of jurisdiction and allowed a final judgment to be entered. He neither moved the district court in *Shaver I* to accept diversity jurisdiction over the case nor appealed the judgment.

Petitioner then filed a separate action in state court (*Shaver II*) again alleging those state claims arising out of his termination of employment. Respondent removed the case to federal court on the basis of diversity jurisdiction. Following the district court's grant of summary judgment to respondent on the merits, the Seventh Circuit held that petitioner's contract claim in *Shaver II* was barred by res judicata.² Petitioner's motion for reconsideration was denied by the Court of Appeals.

REASONS FOR DENYING THE WRIT

Petitioner advances four arguments in support of his petition for certiorari, each of which suffers from the same defect: he has ignored the existence of diversity jurisdiction and argued this case as if pendent jurisdiction were the only possible predicate for his state claim. Critically, not only was diversity jurisdiction available in *Shaver I* but also petitioner

¹ "The record establishes that Shaver in fact knew that diversity jurisdiction existed in the prior age discrimination lawsuit. As part of his discovery in *Shaver I*, Shaver inquired into the factual basis for Woolworth's denial of diversity jurisdiction. In its response, Woolworth stated that it had not denied the existence of diversity jurisdiction, and explained its belief that diversity jurisdiction did exist. Nevertheless, Shaver did not amend his complaint to include diversity of citizenship as a jurisdictional basis." *Shaver v. F. W. Woolworth Co.*, 840 F.2d 1361, 1364 n.1 (7th Cir. 1988).

² Having decided to affirm the district court in *Shaver II* on that basis, the appellate court did not reach the trial court's rationale for granting summary judgment on petitioner's contract claim (which was the only issue petitioner raised on appeal). See *Shaver II*, 669 F. Supp. 243, 246-47 (E.D. Wis. 1986). The trial court had granted summary judgment to respondent on the merits without reaching the res judicata issue, which also had been raised by respondent.

undeniably knew that is was and chose not to utilize that jurisdictional basis. It was this choice of the petitioner not to invoke the diversity jurisdiction of the federal court in *Shaver I* that dictated the application of res judicata in *Shaver II*.

As demonstrated below, this petition for certiorari should be denied. The arguments for granting the writ are based on issues that are not properly presented by the facts in this case.

I. This Case Does Not Implicate, Much Less Conflict With, *United Mine Workers v. Gibbs*

Petitioner correctly argues that a dismissal of pendent claims pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), does not have preclusive effect. That, however, is fundamentally irrelevant. Petitioner knew that he had diversity jurisdiction available and declined to utilize that basis for jurisdiction of the state-law claims in *Shaver I*. See *supra* note 1. Unlike non-diverse plaintiffs whose sole jurisdictional predicate for their state-law claims is the discretionary doctrine of pendent jurisdiction, petitioner could have asserted diversity jurisdiction, which is mandatory. *Carnegie-Mellon University v. Cohill*, ___ U.S. ___, 108 S.Ct. 614, 622 (1988). His voluntary decision not to invoke diversity jurisdiction is what makes res judicata appropriate here. This is, moreover, in accord with the Restatement (Second) of Judgments § 25 comment e (1982): "When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action . . ."

His collateral contention that the order of dismissal in *Shaver I* was not "on the merits with respect to the state-law breach of employment contract claim" (Petition at p. 9) is likewise immaterial. The absence of a decision on the merits on that claim is the inevitable consequence of claim-splitting and cannot militate against the bar of res judicata. There was,

as the Court of Appeals found, a final judgment on the merits with respect to petitioner's federal age discrimination claim; his state-law claim arose out of the same operative event — his layoff; and that claim could have been presented under the court's diversity jurisdiction. Res judicata does not require more. As this Court held in *Brown v. Felsen*, 442 U.S. 127, 131 (1979), "[r]es judicata prevents litigation of all grounds for . . . recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."

II. This Case Does Not Involve A Misapplication of *Federated Dep't Stores, Inc. v. Moitie*

Even if, as petitioner suggests, this Court's decision in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) left an open question on whether unpresented pendent claims are exempt from res judicata, that issue is not presented here. The issue here is whether unpresented diversity claims are exempt from res judicata. As the Court of Appeals held below: "[s]ince diversity jurisdiction is not a doctrine of discretion, but of plaintiff's right, any uncertainty over whether the trial judge would entertain the [unpresented pendent] claim that was present in *Harper* [*Plastics v. Amoco Chemical Corp.*, 657 F.2d 939 (7th Cir. 1981)] is absent from Shaver's situation."³ *Shaver v. F. W. Woolworth Co.*, 840 F.2d at 1366.

Alternatively, petitioner argues that regardless of the holding in *Federated Dep't Stores*, *supra*, his case warrants an exception to preclusion. That argument, however, was cogently rejected by the Seventh Circuit because it "ignores the fact

³ *Federated Dep't Stores*, *supra*, moreover, involved a setting parallel to that in *Harper Plastics*, *supra*. In both cases, the plaintiffs failed to present pendent state claims in conjunction with their original federal anti-trust claims and faced res judicata bars in their subsequent efforts to raise such state claims in separate suits.

that it was the plaintiff's deliberate decision: (1) to initially choose the federal forum; and (2) to bypass his right to invoke the existence of diversity jurisdiction . . . " *Shaver v. F. W. Woolworth Co.*, 840 F.2d at 1366 n. 2. Indeed, just as in *Federated Dep't Stores*, *supra*, "this case is clearly not one in which equity requires that the doctrine give way"; petitioner was "not 'caught in a mesh of procedural complexities' " but "made a deliberate tactical decision" by which he should be bound. 452 U.S. at 403 (Blackmun concurring) (citations omitted).

III. There Is No Conflict In The Circuits

Contrary to petitioner's assertion, the Seventh Circuit's decision below does not conflict with the Fifth Circuit's decision in *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983) (en banc). There is no disagreement as to the controlling principle: "claims which the litigant was unable, *through no fault of his own*, to try out in the federal proceeding should be held not precluded." *Id.* at 563 (emphasis added). There, the Fifth Circuit found (as did the Seventh Circuit here) that it was the plaintiff who was responsible for claim-splitting. Nilsen belatedly attempted to amend her complaint to add a § 1983 claim to her pending Title VII claims. That amendment was rejected and her subsequent separate suit raising her § 1983 claim was held barred by res judicata. The Fifth Circuit concluded that "[t]he system itself was, in and of its nature, ready and able to accommodate all such claims, if timely made, and obliged to entertain them: had the [additional] theory been so advanced, the court would have had no choice but to adjudicate it." *Id.* That holding is fully in accord with the Seventh Circuit's instant decision: "Shaver failed to assert a basis for jurisdiction (diversity) which . . . a federal court would have no discretion to reject." *Shaver v. F. W. Woolworth Co.*, 840 F.2d at 1366.

Where, as here, the claim-splitting is self-induced, the circuit courts are uniform in enforcing the res judicata bar. See, e.g., *Harper Plastics v. Amoco Chemical Corp.*, *supra* (failure to assert discretionary pendent claims barred a second action); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (same); *Cemer v. Marathon Oil Company*, 583 F.2d 830 (6th Cir. 1978) (failure to assert diversity claim in original federal question suit barred subsequent suit); *Kimmel v. Texas Commerce Bank*, 817 F.2d 39 (7th Cir. 1987) (failure to assert federal question claim in original diversity action barred subsequent suit); and *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982) (failure to timely amend federal question suit to add state claims precludes separate suit). "The governing principle is that a party will not be permitted to litigate matters he has already had an opportunity to litigate, whether or not he actually took full advantage of that opportunity." *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 582 (N.D. Cal. 1981), *aff'd in relevant part*, 731 F.2d 1423 (9th Cir. 1984).

IV. This Case Is Of Limited Significance

This decision neither "converts judicially controllable discretionary jurisdiction into mandatory jurisdiction" nor "eliminates trial court discretion whether to exercise jurisdiction over [pendent] state law claims" (Petition at p. 11). Indeed, this case has no impact on purely pendent claims; its scope is limited to those occurrences where a court has both federal question and diversity jurisdiction, but the plaintiff knowingly fails to invoke the court's diversity jurisdiction. This case, accordingly, presents no more than a curious pleading choice. See Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 337-38 (1978) ("Forfeiture of legal rights for failure to assert them at the appropriate time is no novel phenomenon.

It is the very foundation of statutes of limitations and of time limits on the filing of appeals . . . Res judicata policy demands no less.”)

There is concomitantly, no valid issue of comity or docket control. Diversity jurisdiction “is not discretionary” and, thus, if raised, “the District Court could not properly have eliminated the case from its docket” for reasons of comity or docket control. *Carnegie-Mellon University v. Cohill*, *supra*, 108 S.Ct. at 622. Indeed, having initially chosen the federal forum, petitioner’s belated concerns are pretextual excuses for an absolute right to engage in a combination of forum-shopping and claim-splitting which the doctrine of res judicata forecloses by design.

CONCLUSION

This petition poses no new or important issue warranting review by this Court because the practical effect of this case beyond the petitioner is negligible, at best. Rarely, if ever, will a plaintiff who initially chose to bring federal and state claims in federal court under federal question and pendent jurisdiction, voluntarily and knowingly allow the court to dispose of his remaining state claims when mandatory diversity jurisdiction existed. The policies underlying *res judicata*, moreover, preclude a plaintiff in this situation from splitting his claims in order to forum-shop as the petitioner herein is attempting to do.

This petition for certiorari should, accordingly, be denied because it fails to satisfy any of the criteria of Supreme Court Rule 17; the issue is of extremely limited significance; and the decision below is clearly supported by the existing law and applicable policy considerations.

Respectfully submitted,

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